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Supreme Court, U.S.
FILED
AUG 8 - 2006
OFFICE OF THE CLERK

No. 06-214

In the Supreme Court of the United States

Gregory Winskowski,

Petitioner,

v.

City of Stephen, a municipal corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in holding that an employee must expressly request a post-termination name-clearing hearing, even when not informed of the right, and when the policies and practices of the City do not allow a name-clearing hearing.

2. Did the Court err in reversing a jury verdict on an issue that was not raised, briefed or argued in the trial court or on appeal?

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JURISDICTION

The Petition for Writ of Certiorari is sought on the decision of the United States Court of Appeals for the Eighth Circuit, dated March 29, 2006. (A-1.) Petitioner's Request for Rehearing and Rehearing *En Banc* was denied May 19, 2006. (A-9.)

This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(c) to review the circuit court's decision on a Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE FACTS

A. The Proceedings Below

This matter was commenced in the United States District Court for the District of Minnesota. Jurisdiction was based upon 28 U.S.C. § 1331, as the Petitioner raised a Federal question under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983, and as a matter of supplemental jurisdiction under 28 U.S.C. § 1367.

Petitioner Gregory Winskowski was discharged from his job as Police Chief of the City of Stephen after 18 years, following accusations by City Council members at a public meeting of the Council that Winskowski falsified his work records, lied about the days he was working, took excessive vacation time, and engaged in other wrongdoing. He brought a claim for violation of his liberty interest under the Due Process Clause of the Fourteenth Amendment to the United

States Constitution pursuant to the Federal Civil Rights Act, 42 U.S.C. § 1983, for failure to provide a name-clearing hearing, and under the Constitution of the State of Minnesota, Article 1, Section 7.

The matter was tried to a jury, which determined that the City violated Winskowski's rights and awarded him $125,001. (A-27, 28.) In post-trial proceedings, the trial court awarded reasonable attorney's fees and costs (A-2), and denied the City's motions for judgment not withstanding the verdict or for a new trial. (A-10.) On appeal, the Eighth Circuit Court of Appeals reversed the jury verdict based on a single issue that was not raised or argued below or on appeal; that Winskowski allegedly had not expressly requested a name-clearing hearing prior to commencing legal action, which he actually had done. (A-8.)

B. The Litigation Background

Petitioner Winskowski, a veteran law enforcement officer, had been the Police Chief and sole police officer in the City of Stephen, a small town of about 700 people in northeastern Minnesota, from 1980 until his termination in December, 1998. (A-1, 2.)

On December 7, 1998, a newly-elected member of the five-person City Council launched a surprise attack on Winskowski's character and integrity. At a public meeting of the Council, without any prior notice, Lenore Pietruszewski accused Winskowski of falsifying his work hours, lying about the days he was working, taking excessive vacation time, and other wrongdoing. (*See* A-2.) Two other Council members expressed approval of her remarks, which were heard by about 12 people in attendance (2% of the town's population), including a state highway trooper, who labeled the comments a "bashing hour." As is typical in a small community, word

spread rapidly and soon nearly everyone heard about the "bashing" of Winskowski.[1]

The following week, Winskowski asked to be heard by the Council about the accusations. The Council began its public session on December 14, 1998, by approving the budget for the police department for the next year, including a salary increase for Winskowski. The Council then retreated into private session, where Winskowski was allowed to speak to it in a private, closed session. Winskowski described to the council members his job duties and responsibilities. No one else was present. The Council then reconvened in its public session and, by a vote of 3-2, eliminated the police department, thereby immediately terminating Winskowski's employment. The City did not have arrangements with the surrounding County to provide law enforcement services when it fired him, and arrangements were not formalized until 2 1/2 years later.

Winskowski was never given a hearing in public or even an informal opportunity to respond in public to clear the air of the charges leveled against him. Winskowski had no pre-termination hearing because he was never told that he was in danger of losing his job. The City had no post-termination grievance procedures, and Winskowski was not notified of a right to any post-termination proceeding. (A-6.)

The charges against Winskowski were, indeed, serious ones that called into question his character and honesty. Council Member Pietruszewski, his chief adversary, offered a *mea culpa* at trial for "behaving poorly." She apologized for being "miserably unprepared," expressed contrition for doing an "injustice to Mr. Winskowski," expressed remorse for giving Winskowski "less respect than he most certainly deserved," and regretted acting "irresponsibly." Other council members recognized that the accusations damaged Winskowski's reputation in the community. One observed

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[1] A petition was later submitted to the City Council signed by 163 residents, nearly 25% of the population, protesting the Council's actions.

that Winskowski's "honor" had been attacked, and another acknowledged that the comments stigmatized Winskowski and could seriously damage his reputation. A State Trooper, who happened to be at the public meeting, described the Council's vitriolic diatribe against Winskowski as a "bashing hour."

Winskowski sued in 2002, for violation of his right to Due Process, consisting of deprivation of his property interest by losing his job and his liberty interest in not being afforded a name-clearing hearing. The City moved for summary judgment, which was denied. After a four-day trial, a jury found against Winskowski on the property interest claim, and ruled in his favor on the absence of a name-clearing hearing, awarding him damages of $125,001. (A-27, 28.) The trial court subsequently awarded reasonable attorney's fees and costs to Winskowski under 42 U.S.C. § 1988 in the amount of $54,469.57. (A-2.)

The City never raised, in the trial court, the issue of whether Winskowski was required to request a post-termination name-clearing hearing or whether he failed to do so. It did not mention the issue in its Answer, Motion for Summary Judgment, pre-trial briefing, or in post-trial challenges to the verdict. Since the issue was not raised below, Winskowski never addressed (a) whether he was required, as a matter of law, to request such a post-termination hearing, or (b) whether he had done so.

Although the issue was not raised below, Winskowski actually had requested a post-termination hearing on two occasions. After his discharge, his attorneys wrote to the City's attorney, asserting that Winskowski was "entitled to a hearing." (A-30.) A month later, after his first request was rebuffed, Winskowski's attorney repeated the claim that actions of the City "would entitle Mr. Winskowski to a hearing." (A-32.) The City did not accede to either request. Since the issue of whether Winskowski requested a hearing

was never raised at trial by the City, the letters were not introduced at trial.

The City appealed the jury verdict and award of attorney's fees. As in the trial court below, the City did not raise the issue on appeal of whether Winskowski was required to expressly request a hearing, in the Eighth Circuit standard appeal Form A, in its briefing, or at oral argument, which was heard by the court on February 17, 2006. Whether Winskowski was required to request a name-clearing hearing was not addressed by counsel, or asked about by the Panel, since it was not raised or briefed as an issue below or on appeal.

On March 29, 2006, the Panel reversed, *sua sponte*, holding that Winskowski was not entitled to a name clearing hearing because he did not make a specific request for one after he was fired. (A-8.) This issue had never been raised, addressed, briefed, or argued in the trial court or on appeal.

The Panel assumed that the accusations attacking Winskowski's character and integrity were sufficiently serious to entitle him to a post-termination name-clearing hearing. (A-5.) It then, *sua sponte*, raised an issue "that we have not directly answered . . . before," whether an employee must expressly request such a hearing after termination. (A-6.) It held, as a matter of law, that Winskowski was required to "prove that he sought one before litigation." (A-8.) It also determined, as a matter of fact, that he "never requested any post-termination process" after he was fired. (A-6.) Winskowski had, in fact, done so, but the issue was never raised or addressed below. (A-30, 33.)[2] Thus, the Panel held that his liberty interest claim was barred, and it reversed the judgment below. (A-8.)

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[2] Since the issue of whether Winskowski expressly requested a name-clearing hearing was not briefed, argued, or raised on appeal, Winskowski's counsel did not have the opportunity – or need – to point out that Winskowski had, in fact, made two such requests to the City, both of which were declined or ignored.

Winskowski requested Rehearing and Rehearing *En Banc,* asserting that the issue was improperly decided by the Panel because it was not raised, addressed, briefed, or argued below or on appeal. He also maintained that a specific request for a name-clearing hearing is not required and, if it is, he made such a request with the City. His request for Rehearing and Rehearing *En Banc* was denied on May 19, 2006. (A-9.)

ARGUMENT

The Court should review this matter for two reasons. First, there is a split among the circuits on whether a person denied liberty interests under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983, must first specifically ask for a name-clearing hearing before being permitted to bring a legal action. Second, the Court should review this matter in the exercise of its supervisory obligations under Rule 10(a) of the Rules of the Supreme Court because the Eighth Circuit *sua sponte* reversed a jury verdict entered for the Petitioner based on an issue not raised or argued by any of the parties at any stage of the proceedings. Such a reversal denies the Petitioner fundamental due process rights which this Court is sworn to protect.

A. There is a Split Among the Circuits Whether a Specific Request for a Name-Clearing Hearing is Required to Trigger a Liberty Interest Claim

A split exists among the circuits on whether an explicit request must be made for a post-termination name-clearing hearing in order for a person to bring a claim for violation of the right to liberty under 42 U.S.C. § 1983.

This Court has long recognized that a public sector employee whose reputation is stigmatized by accusations of immorality or illegality is entitled to a name-clearing hearing under the liberty prong of the Due Process Clause. *See Bd. of*

Regents v. Roth, 408 U.S. 564, 569-70 (1972) *and Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

Loudermill held that "an essential principal of due process is that a deprivation of life, liberty or property 'be preceded by notice and opportunity for hearing . . . . '" *Id.* (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). Thus, *Roth* and *Loudermill* contemplate that a governmental employee who has been stigmatized by statements accompanying a discharge must be provided, except in exigent circumstances, notice and a hearing to respond in public to the charges.

Winskowski was never notified of his impending discharge. Even if there were a requirement that he request a name-clearing hearing ***before*** termination, he could not have done so, because he did not know that he was about to be fired, and the City had no post-termination hearing procedures.

Winskowski had been subjected to stigmatizing comments in a public forum at a City Council meeting a week prior to his discharge. He asked to address the City Council about his job duties, believing that the stigmatizing allegations resulted from a misunderstanding about his job duties. He was not told, and did not know, that the City was contemplating firing him. Because he did not know that the City was contemplating firing him, he could not have requested a name-clearing hearing prior to his discharge. Only minutes before he was fired, the Council had approved the budget for the next year giving Winskowski a salary increase. Thus, the private meeting with the Council immediately before his discharge was not a name-clearing hearing.

Previously, the Eighth Circuit had consistently required public employers to provide notice and a hearing before deprivations of liberty. In *Miller v. Lowell,* 14 F.3d 20, 21 (8th Cir. 1994), the court held that the notice requirement applied to liberty interests as well as property

interests. The court explained that "[t]o comply with procedural due process, an employer must give a public employee verbal or written notice of the charges against the employee, an explanation of the employer's evidence, and an opportunity to respond before terminating the employee." *Id. See also Graning v. Sherburne County*, 172 F.3d 611, 616 (8th Cir. 1999) (public employee is "entitled to notice and a name-clearing hearing when fired under circumstances imposing a stigma on [the employee's] professional reputation"); *Johnson v. Rogers*, 621 F.2d 300, 305 (8th Cir. 1980) (public employee "terminated under circumstances imposing a stigma on his professional reputation and impairing his ability to find future employment, was entitled to notice and a name-clearing hearing").

Where, as here, the employee was not provided notice of potential discharge, the allegations against him, and his right to a name-clearing hearing, he cannot be penalized for not requesting a name-clearing hearing, and thus be deprived of the constitutional protection of his liberty.

The Eighth Circuit Panel in this case recognized the absence of a clear-cut answer to the question of whether a specific post-termination request for a name-clearing is required, noting that the Eighth Circuit has "not directly answered the question before." (A-6.) The Court went on to cite cases in the other circuits that have answered it affirmatively: the First, Fifth and Sixth.[3] (A-6-7.)

But the Panel disregarded the existence of contrary holdings of other circuits. The Tenth Circuit has held that

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[3] The Fifth Circuit in *Rosenstein v. City of Dallas,* 876 F.2d 392 (5th Cir. 1989), which was relied on by the Eighth Circuit, held that because the City lacked an appeals process for its probationary employees, it could create an alternative process for name-clearing hearings, but "must 'make known to the stigmatized employee that he may have an opportunity to clear his name upon request.'" *Id.* at 396 (quoting *In re Selcraig,* 705 F.2d 789, 796 (5th Cir. 1983)). The City of Stephen had no appeals process for discharged employees, and did not notify Winskowski of an opportunity for a hearing to clear his name.

such a request is not a prerequisite, stating in *Eames v. City of Logan,* 762 F.2d 83, 86 (10th Cir. 1985) that "Plaintiff's failure to earlier request a name-clearing hearing does not defeat his claim." The Eleventh Circuit concurs, ruling in *Buxton v. City of Plant City,* 871 F.2d 1037, 1046 (11th Cir. 1989) that "a public employer is required to provide the opportunity for a post-termination name-clearing hearing when stigmatizing information is made part of the public records, or otherwise published. Notice of the right to such a hearing is required." The Third Circuit, in *Hill v. Borough of Kutztown,* __ F.3d __, 2006 WL 2061145 (3d Cir. 2006), also held that a plaintiff is not required to request a name-clearing hearing. *Id.* at *8, n.19.

Similar to the Third, Tenth and Eleventh Circuits which do not require an explicit request for a hearing, two other Federal Appellate Tribunals lean in the same direction without directly ruling on the issue. The Fourth Circuit refused to dismiss a § 1983 case based on failure to provide a name-clearing hearing, in part, because the "facts provide no evidence that [the plaintiff] had notice that he was being given an opportunity to 'clear his name,' let alone notice of a hearing 'conducted specifically for the stated purpose of allowing him to attempt to refute the charges against him. . . .'" *Richardson v. Orangeburg Sch. Dist. No. 1,* 539 F.3d 329 (Table), No. 94-2092, 1995 WL 255941, at *3 (4th Cir. 1995) (quoting *Boston v. Webb,* 783 F.2d 1163, 1166 (4th Cir. 1986)). The District of Columbia Circuit held in *O'Donnell v. Barry*, 148 F.3d 1126, 1140 n.4 (D.C. Cir. 1998), that a liberty interest claim is not foreclosed because the employee did not "expressly seek a name-clearing hearing . . . so long as it is reasonably clear that what the plaintiff complains of includes the lack of a hearing."

The decisions of the Third, Tenth and Eleventh Circuits, and the intimations of the Fourth and D.C. appellate tribunals, are consistent with the Supreme Court's directives in *Loudermill* and *Roth.*

Thus, three circuits seemingly require an express request for a name-clearing hearing, three do not, and two others apparently eschew any such requirement. The circuits, thus, are widely split on this issue.

This type of fissure, multiple circuit court decisions on each side of the issue, augurs for review by this Court to clarify the inconsistency and harmonize the law. *See, e.g., Burlington Northern & Santa Fe Railway Co.*, __ U.S. __, 126 S. Ct. 2405, 2410-11 (2006); *Braxton v. United States,* 500 U.S. 344, 347 (1991); *Bingler v. Johnson,* 394 U.S. 741, 748 (1969). This is particularly so when dealing with a Constitutional law issue, which calls for uniform national application. *See, e.g., Yellin v. United States,* 374 U.S. 109, 111 (1963); *In re Murchison,* 349 U.S. 133, 136 (1955).

This is an important question because it potentially affects all public sector employees in this country, including some 354,000 in Minnesota alone, and over 19 million nationwide.[4] Any of these employees could, like Police Chief Winskowski, be subjected to stigmatization in connection with a discharge from employment. It also is a significant matter because name-clearing hearings pose recurrent issues throughout the country, which are occurring with increasing frequency at both federal and state court levels. An "all cases" search on Westlaw of "name clearing hearing" reveals 739 cases since *Roth* was decided in 1972, an average of about 21 per year. This includes 380 such cases, an average of 38 per year, in the last 10 years. *See, e.g., Patterson v. City of Utica,* 370 F.3d 322 (2d Cir. 2004); *Cox v. Roskelley,* 359 F.3d 1105 (9th Cir. 2004); *Rosenstein v. City of Dallas,* 876 F.2d 392 (5th Cir. 1989); *State ex rel. Kilburn v. Guard,* 5 Ohio St.3d 21, 25, 448 N.E.2d 1153, 1157 (1983); *Washington v. Indep. Sch. Dist. No. 625,* 590 N.W.2d 655,

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[4] These figures include part time and full time state and local government employees as of March 2005 and are derived from the United States Census Bureau website. *See* www.census.gov.

659 (Minn. Ct. App. 1999); *Kahn v. Kelly,* 790 N.Y.S.2d 85, 86 (N.Y. App. Div. 2005).

B. Winskowski Was Denied Due Process Because the Issue Whether a Name-Clearing Hearing Must be Specifically Requested and be Denied Was Not Addressed Below or on Appeal.

The overturning by the Eighth Circuit of a jury verdict based on an issue that it raised *sua sponte*, and not raised or argued below or on appeal "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power. . . ." Supreme Court Rule 10(a). At no time during the three year course of this litigation, did the City claim that: (a) Winskowski was required to specifically request a name-clearing hearing; or (b) that he failed to do so. This issue was *not* raised in (a) the City's Answer; (b) in its Motion for Summary Judgment; (c) in pre-trial Motions; (d) at trial; (e) in post-trial challenges; (f) in Form A, designated as the City's Statement of Issues on appeal, under Fed. R. App. P. 10(b)(3); (g) in the City's initial Brief to the 8th Circuit; (h) in the City's Reply Brief; or (i) by the City at oral argument before the Panel. In short, on nine separate occasions in the trial court and on appeal, the City never raised these issues.

To the contrary, the City acknowledged below that "Winskowski asked for a meeting with the city council to address her (sic) allegations, and that is what he was provided," referring to the non-public, closed *pre-termination* discussion with the Council.

Winskowski argued, and the jury agreed, that the closed, private session that the City gave Winskowski before he was fired was not a sufficient opportunity to clear his name because his reputation had been besmirched in public, not in private. The City never argued in the trial court below or on appeal that Winskowski was legally required to specifically request a post-termination name-clearing hearing. Indeed, the

City had no policies or procedures allowing for one, and it never informed him of any such right.

Had the City raised these issues prior to trial, Winskowski would have had the opportunity to conclusively show by incontrovertible documentary evidence that he requested a name-clearing hearing, not once, but twice. The evidence would have reflected that Winskowski made the request twice before litigation, asserting first that he was "entitled to a hearing," which the City declined to give him, before commencing this suit. (A-30, 33.) Had the issue been raised before the Eighth Circuit, Winskowski would have had an opportunity to present these documents to the Panel. Since the issue was never raised by the City, the trial court, or the appellate panel, Winskowski had no need to refute the non-existent defense.

While subject matter jurisdiction can, of course, be raised by the Court *sua sponte, Thomas v. Basham,* 931 F.2d 521, 522-23 (8th Cir. 1991), the issue whether Plaintiff *must* request a hearing and the factual issue whether he did so are not jurisdictional. *See United States v. Cotton,* 535 U.S. 625, 630-31 (2002) (stating that a jurisdictional defect is one that goes to a court's "power to hear a case"). Since the issue was not raised either at trial or on appeal, fundamental fairness dictates that this Court should, in the exercise of its "supervisory power" review and reverse the decision below.

Significant Due Process concerns exist when a case is dismissed on a non-jurisdictional issue that was not raised by the parties. The City was blind to this issue and Winskowski was blind-sided by it being raised as the decisive issue, *sua sponte*, by the Panel **after** the oral argument, without being raised, briefed, or addressed below or on appeal.

In *Arbaugh v. Y & H Corp.*, __ U.S. __, 126 S. Ct. 1235, 1240 (2006), this Court held that the defendant waived the defense of the failure to meet the numerical threshold for a Title VII action because it did not raise the issue until two weeks after the jury verdict. The Court noted that a defense

of "fail[ure] to state a claim upon which relief can be granted" under Fed. R. Civ. P. 12(b)(6) "endures up to, but not beyond, trial on the merits. . . ." *Id.* In the present case, as in *Arbaugh,* a party's failure to raise an issue before, during, or even after trial – or on appeal – is a waiver of that issue, and does not warrant reversal of a jury verdict in favor of the other, diligent litigant.

Similarly, in *Trest v. Cain,* 522 U.S. 87, 92 (1997), this Court vacated and remanded a case in which the court of appeals decided a matter, *sua sponte*, on an issue not raised or briefed by the parties. The Court observed: "[w]e do not say that a court must always ask for further briefing when it disposes of a case on a basis not previously argued. But often, as here, that somewhat longer (and often fairer) way 'round is the shortest way home." *Id. See also, Bendet v. Sandoz Pharms. Corp.,* 308 F.3d 907, 912 (8th Cir. 2002) (reversing the District Court's *sua sponte* grant of summary judgment because plaintiff was not given a chance to present evidence on the issue of causation); *Swipies v. Kofka*, 419 F.3d 709, 717 (8th Cir. 2005) (refusing to overturn a jury verdict based on defective jury instructions because the defendant had not raised the issue at trial or on appeal).

Appellate courts generally do not consider issues not timely raised below, or on appeal, because the failure to make the argument precludes the other litigant from responding. *See Ellis v. Dixon,* 349 U.S. 458, 459 (1955); *Nebraska Plastics, Inc. v. Holland Colors Americas, Inc.*, 408 F.3d. 410, 421 n.5 (8th Cir. 2005) (courts generally "[do] not consider issues first raised in a reply brief"); *see also Martin v. Am. Airlines, Inc.*, 390 F.3d. 601, 608 n.4 (8th Cir. 2004); *Gregory v. Honeywell, Inc.*, 835 F.2d 181, 184 (8th Cir. 1987).

But, in this case, the perversity was much greater. The City never raised the issues in any of its pleadings, briefs or oral arguments, at trial or on appeal. This precluded Winskowski from responding to the non-existent issue of law

– whether he was required to request a hearing – and from asserting that, in fact, he did make such a request on two occasions. Lacking any knowledge that the issue might later be raised by the court, *sua sponte* on appeal, Winskowski did not present evidence that he twice requested a post-termination hearing and that the City declined both requests.

C. Winskowski Requested a Name-Clearing Hearing.

Even if a specific request for a name clearing hearing is required, Winskowski complied with that obligation. He did, in fact, request a hearing after his reputation was besmirched at the December 7, 1998, meeting of the City Council. He asked for an opportunity to speak to the Council, believing that some Council Members did not understand his job after he had been subject to a public bashing. However, at that time, he had not been given notice that he might be subject to discipline and, naturally, he used this time only to explain his job duties rather than clear his name. The Council never gave him a chance to publicly address the stigmatizing allegations.[5]

Allowing Winskowski to address the Council in private and before his discharge does not effectuate his liberty interest right to a post-termination name-clearing hearing. When a person's name and reputation are besmirched in public, as occurred here, the only meaningful way that person can remedy the stain on his good name and reputation is at a public hearing so that the retort takes place in the same public forum as the accusations. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge,*

---

[5] The non-public proceeding ostensibly was granted under a provision of the City's Work Rules, which gives a current employee a right to a "confidential hearing . . . to air any grievance." (Trial Exhibit Pltf. #2) Winskowski did not request a confidential hearing under this provision after his discharge because this hearing was not available after discharge.

424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)). *See also Loudermill,* 470 U.S. at 542 ("an essential element of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'") (quoting *Mullane,* 339 U.S. at 313).

Responding to a public "bashing" in a confidential, closed setting does not give the employee a meaningful and effective opportunity to refute the charges against him.[6] After he was fired, Winskowski, on two occasions, explicitly stated he was entitled to a hearing through counsel. (A-30, 33.) The City rejected both requests.

In sum, Winskowski is entitled to a "name-clearing" hearing to try to remove the stain on his reputation caused by the City's stigmatizing attack on his character and integrity. He should have been granted an opportunity to clear his name in public, not in a closed session solely before his accusers and before he was even notified that he might be discharged. The City was obligated to notify him of his right to a post-termination hearing to allow him to try to clear his name in public, regardless of any request by him. Even if a request were required, Winskowski made two such requests, which the City declined. It is a substantial miscarriage of justice to override a jury verdict based on an issue not raised at trial, nor briefed or argued on appeal, which this Court should correct under its supervisory power.

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[6] While not raising the issue whether a request for a hearing is obligatory, the City, in its opening brief to the Eighth Circuit, recognized that "it was for the jury to determine whether . . . Winskowski had an opportunity to refute the charges at a meaningful time and in a meaningful manner." Appellant's Brief to the Eighth Circuit, p. 26. This, in effect, constitutes an admission that an explicit request is not required as a matter of law and is concurrent with the views of the Third, Fourth, Tenth, Eleventh and D.C. Circuits. *See pp. 11-12, supra.*

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari of Gregory Winskowski should be granted.

Respectfully submitted,

Dated: August 8, 2006

MANSFIELD, TANICK & COHEN, P.A.

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United States Court of Appeals
for the Eighth Circuit

No. 05-2777

Gregory Winskowski,
Appellee,

v.

City of Stephen,
Appellant.

Appeal from the United States District Court for the District of Minnesota.

Submitted: February 17, 2006 Filed: March 29, 2006

Before WOLLMAN, ARNOLD and GRUENDER,
Circuit Judges.

GRUENDER, Circuit Judge.

Appellee Gregory Winskowski served as police chief for Appellant City of Stephen ("Stephen") from 1980 until Stephen terminated Winskowski's employment in 1998. Following the termination of his employment, Winskowski sued Stephen, claiming that Stephen violated Winskowski's procedural due process rights when it deprived Winskowski of his property interest in continued employment and his liberty interest in his good name.

At trial, a jury returned a verdict in Stephen's favor with respect to Winskowski's property interest claim but awarded Winskowski $125,001 in damages on Winskowski's liberty interest claim. Following trial, Stephen moved for judgment as a matter of law or, in the alternative, a new trial. Winskowski moved for a new trial on his property interest claim and for an award of attorney's fees. The district court denied Stephen's post-trial motions and Winskowski's motion

for a new trial but awarded Winskowski $54,469.57 in attorney's fees. Stephen appealed. We reverse.

I. BACKGROUND

Stephen is a Minnesota town with approximately 700 residents. Until December 1998, Stephen had its own police department, and Winskowski served as that police department's only full-time officer. Beginning in November 1998, Stephen's city council began considering proposals to disband its police department in favor of purchasing police protection from Marshall County. Winskowski attended a November 1998 council meeting at which the council discussed the police department's potential elimination. The council discussed the police department's elimination again at a December 7, 1998, meeting attended by Winskowski, his wife, a deputy sheriff from a nearby county and four other citizens of Stephen.

During the December 7, 1998, meeting, city councilperson Lenore Pietruszewski criticized Winskowski's job performance. Among Pietruskzewski's criticisms were that Winskowski: (i) failed to patrol the required number of hours; (ii) failed to follow rules for on-call duty; (iii) took more vacation than allowed; (iv) violated procedures for advising the county when he was off-duty; and (v) communicated poorly with the city council because he did not attend council meetings and did not keep the council informed about his days off work. Winskowski later testified that the December 7 meeting was a "job evaluation" and that Pietruszewski called Winskowski a liar who cheated the city.

In response to Pietruskzewski's criticisms, Winskowski asked for a grievance hearing. The city clerk scheduled the grievance hearing for the next meeting, which was held a week later on December 14, 1998. During the December 14 council meeting, the council was scheduled to determine the police department's budget for the next year. A

Marshall County commissioner spoke at the meeting, telling the council what police protection the county could offer to Stephen. The council then discussed the likely savings if it contracted with the county for police protection.

After the council's discussion of the potential savings, the council went into closed session to allow Winskowski to speak. Winskowski's wife also attended the closed session. Winskowski read a prepared statement responding to Pietruszewski's criticisms. Following Winskowski's statement, the council went back into open session and voted three to two to obtain police services from the county. As a result, Winskowski's employment with Stephen was terminated.

After the termination of his employment, Winskowski did not ask for any additional public hearing but instead filed the instant suit. Winskowski made two different claims. First, Winskowski claimed that Stephen deprived Winskowski of his property interest in continued employment without sufficient due process. Second, Winskowski claimed that Stephen stigmatized him by publicly stating in connection with the termination of his employment that Winskowski was a liar, and that Stephen thereafter deprived Winskowski of a liberty interest in his good name by failing to offer Winskowski a sufficient opportunity to clear his name. Because the jury returned a verdict for Stephen on Winskowski's property interest claim, which Winskowski does not appeal, we address only the issue of whether the district court erred in denying Stephen judgment as a matter of law with respect to Winskowski's liberty interest claim.

II. DISCUSSION

We review denial of a motion for judgment as a matter of law de novo using the same standards as the district court. *Keenan v. Computer Assocs. Int'l, Inc.*, 13 F.3d 1266, 1268 (8th Cir. 1994). Judgment as a matter of law for the defendant

is warranted if there is insufficient evidence to support a jury verdict in the plaintiff's favor. *Id.* When reviewing a motion for judgment as a matter of law, this Court must: "(1) resolve direct factual conflicts in favor of the nonmovant, (2) assume as true all facts supporting the nonmovant which the evidence tended to prove, (3) give the nonmovant the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn." *City Nat'l Bank of Fort Smith v. Unique Structures, Inc.*, 929 F.2d 1308, 1312 (8th Cir. 1991) (internal quotation omitted).

Winskowski's liberty interest claim is based upon Stephen's alleged failure to provide Winskowski with a name-clearing hearing after councilperson Pietruszewski criticized Winskowski's job performance at an open city council hearing. As we have held previously, "[a] government employee is entitled to procedural due process . . . when he has been deprived of a constitutionally protected . . . liberty interest. An employee's liberty interests are implicated where the employer levels accusations at the employee that are so damaging as to make it difficult or impossible for the employee to escape the stigma of those charges." *Winegar v. Des Moines Indep. Cmty. Sch. Dist.*, 20 F.3d 895, 900 (8th Cir. 1994) (internal citation omitted); *see also Mercer v. City of Cedar Rapids,* 308 F.3d 840, 845 (8th Cir. 2002); *Green v. St. Louis Hous. Auth.*, 911 F.2d 65, 69 (8th Cir. 1990).

Where a government employee has been sufficiently stigmatized, the employee's procedural due process rights are vindicated by a "name-clearing hearing at a meaningful time" during which the employee can respond to the employer's accusations. *Schleck v. Ramsey County,* 939 F.2d 638, 642 (8th Cir. 1991). Although other circuits have determined that post-termination name-clearing hearings are sufficient to protect the employee's procedural due process rights, this Court has "at least implied that a pre-termination name-

clearing hearing may [also] be required." *Id.* at 642 n.5 (citations omitted).

The minimum acceptable scope of a pre-termination name-clearing is dictated by the Supreme Court's decision in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985). *Schleck,* 929 F.2d at 642 n.5. Consistent with *Loudermill,* this Court has held that a pre-termination hearing "need not be elaborate." *Id.* at 641-42. To the contrary, all that is required is that the employee have "notice of the charges. . ., an explanation of the employer's evidence, and an opportunity [for the employee] to present his side of the story." *Id.* (quoting *Loudermill,* 470 U.S. at 546) (emendation in *Schleck).* Thus, for instance, an "informal meeting[ ] with supervisors" may constitute a sufficient pre-termination hearing. *Riggins v. Bd. of Regents,* 790 F.2d 707, 711 (8th Cir. 1986); *see also Coleman v. Reed,* 147 F.3d 751, 753-54 (8th Cir. 1998) (private meeting attended by employee, associate school superintendent and employee's attorney constituted sufficient pre-termination hearing).

Assuming without deciding that Winskowski was entitled to a name-clearing hearing based upon Pietruszewski's criticisms, we hold that Winskowski's meeting with the city council on December 14, 1998, constituted a sufficient pre-termination name-clearing hearing. Winskowski learned of the city council's charges and evidence a week before his December 14 grievance hearing. This amount of notice is certainly sufficient. *See, e.g., Coleman,* 147 F.3d at 754 (holding that notice of charges and evidence contemporaneous with pre-termination hearing is sufficient). Moreover, the December 14 closed-session hearing afforded Winskowski a chance to respond to Pietruszewski's charges that was at least as complete as the hearings we approved in *Riggins* and *Coleman.*

Assuming that Winskowski was entitled to a post-termination name-clearing hearing, the only question

remaining is whether Stephen improperly denied him one. Winskowski's claim in this regard fails in its incipiency because Winskowski never requested any post-termination process from Stephen. We have previously held that a government employee cannot recover for a due process violation where the employee simply failed to avail himself of the post-termination process that was available. *See, e.g., Schleck,* 939 F.2d at 643 ("That . . . a [post-termination] hearing never was conducted because Schleck and Kraft declined to avail themselves of it does not give rise to a due process violation."). We are not alone in our approach to the issue. *See, e.g., Grillo v. NY City Transit Auth.,* 291 F.3d 231, 234 (2d Cir. 2002) (rejecting a liberty interest claim where an employee failed to avail himself of an available post-deprivation remedy).

Unlike the employer in *Schleck,* Stephen did not unilaterally offer Winskowski a name-clearing hearing. Accordingly, we must decide whether the principle enunciated in *Schleck* applies with equal force where the employer never offered a hearing, but the employee nevertheless failed to ask for one. We hold that it does. Nothing in our jurisprudence suggests that a government employee can legitimately sue for deprivation of the right to a post-termination hearing where he never asserted the right before suing for damages. Allowing an employee to claim damages for being deprived of a hearing never requested would greatly expand government employers' potential liability and force such employers prophylactically to offer name-clearings when it is not at all clear that the employee is entitled to—or even desires—one. It would also reward employees for lying in wait and later asserting a right that the employer had no reason to suspect the employee wanted to exercise in the first place. Although it appears that we have not directly answered this question before, we agree with the case law developed in other circuits that holds that an

employee who fails to request post-termination process cannot later sue for having been deprived of it. *See, e.g., Wojcik v. Mass. State Lottery Comm'n,* 300 F.3d 92, 103 (1st Cir. 2002) (stating that, before an employee can succeed in a liberty interest deprivation claim, "the government must have failed to comply with the employee's request for an adequate name-clearing opportunity"); *Quinn v. Shirey,* 293 F.3d 315, 321-22 (6th Cir. 2002) (holding that a § 1983 plaintiff must request a hearing before he can later claim that he was denied one); *Rosenstein v. City of Dallas,* 876 F.2d 392, 396 (5th Cir. 1989) (stating that the elements of a § 1983 claim based upon the lack of a name-clearing hearing include that the employee "requested a hearing in which to clear his name, and that the request was denied").

Winskowski argues that the law does not require a plaintiff actually to seek a name-clearing hearing before suing for failure to be granted one, relying upon *O'Donnell v. Barry,* 148 F.3d 1126 (D.C. Cir. 1998), and *Mercer v. City of Cedar Rapids,* 104 F. Supp. 2d 1130 (N.D. Iowa 2000), *aff'd on other grounds,* 309 F.3d 840 (8th Cir. 2002). Neither case supports his contention. While the *O'Donnell* court appears generally to reject an argument that the employee's "due process claims should be denied because he did not expressly seek a name-clearing hearing," the *O'Donnell* court was apparently addressing a possible D.C. Circuit requirement that plaintiffs suing for a procedural due process violation seek *in their litigation* a name-clearing hearing as a *remedy. Compare O'Donnell,* 148 F.3d at 1140 n.4., *with Doe v. Dept. of Justice,* 753 F.2d 1092, 1103-04 (D.C. Cir. 1985) (upon which *O'Donnell* relied). Such a requirement is not at issue here, and *O'Donnell* is inapposite. The district court's opinion in *Mercer* is equally unpersuasive. The *Mercer* court cited no law in support of its statement that "the law . . . does not appear to require the plaintiff to demand . . . a hearing." 104 F. Supp. 2d at 1149. More critically for our purposes, the

plaintiff in *Mercer* sought to enforce his procedural due process rights before suing. *Id.* ("The record . . . demonstrates, beyond dispute, that Mercer affirmatively asserted a demand for redress of the 'procedural' due process violation prior to filing suit, but received no response."). As we have noted, this is exactly what Winskowski failed to do.

To the extent *O'Donnell* and *Mercer* might suggest that a plaintiff need not request additional post-termination process, we are not bound by their holdings, and we find them unpersuasive. Rather, we agree with the circuits cited above that, when suing for deprivation of a name-clearing hearing, a plaintiff must prove that he sought one before litigation. Winskowski's failure to do so here bars any recovery.[1]

III. CONCLUSION

Accordingly, we vacate the judgment against Stephen and remand the case with instructions to enter judgment for Stephen.[2]

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[1] Stephen also argues that Winskowski's pleadings did not put Stephen on fair notice concerning Winskowski's liberty interest claim and that the evidence did not support the damages. Because we reverse on other grounds, we need not reach these issues, and we express no opinion as to their merit.

[2] As Winskowski has not prevailed, the district court's award of attorney's fees is also vacated. *See* 42 U.S.C. § 1988 (attorney's fees available only if claimant prevails).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
No. 05-2777

Gregory Winskowski,

Appellee,

vs.

Order Denying Petition for Rehearing and for Rehearing En Banc

City of Stephen,

Appellant.

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

May 19, 2006

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Gregory Winskowski,
Plaintiff,

v.

MEMORANDUM OF LAW & ORDER
Civil File No. 02-4082 (MJD/RLE)

City of Stephen, a municipal corporation,
Defendant.

Marshall H. Tanick, Mansfield, Tanick & Cohen, Counsel for Plaintiff.
Julie Fleming-Wolfe, Counsel for Defendant.

I. INTRODUCTION

This matter is before the Court on Defendant City of Steven's post-trial motion for judgment as a matter of law or in the alternative for a new trial. For the reasons that follow, the Court denies Defendant's motion.

II. BACKGROUND

The jury returned a verdict in this case on February 11, 2005. The jury returned its verdict in the City's favor with regard to Plaintiff's claim that he was denied a due process hearing to challenge his termination, finding that Plaintiff was an at-will employee. The jury returned a verdict for the Plaintiff on the liberty interest claim. It found that the Plaintiff was entitled to a name-clearing hearing, that he did not receive one, and that his failure to receive a name-clearing hearing resulted in damages in the amount of $125,001.

III. DISCUSSION

A. Legal Standard

In a motion for judgment as a matter of law, the question is whether there is sufficient evidence to support a jury verdict. White v. Pence, 961 F.2d 776, 779 (8th Cir. 1992). In order to sustain a motion for judgment as a matter of law, "all the evidence must point in one way and be susceptible of no reasonable inference sustaining the position of the nonmoving party." Id. When considering such a motion, this Court must:

> (1) resolve direct factual conflicts in favor of the nonmovant, (2) assume as true all facts supporting the nonmovant which the evidence tended to prove, (3) give the nonmovant the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn.

Id. (citing Dace v. ACF Industries, Inc., 722 F.2d 374 (8th Cir. 1983). A trial court does not err if it denies a motion if there is substantial evidence—more than a mere scintilla—to support a verdict in favor of the nonmoving party. City National Bank of Fort Smith v. Unique Structures, Inc., 929 F.2d 1308, 1312 (8th Cir. 1991).

In a motion for a new trial, the question is whether the verdict is against the weight of the evidence such that the first trial resulted in a "miscarriage of justice." Shaffer v. Wilkes, 65 F.3d 115, 117 (8th Cir. 1995) (citing White, 961 F.2d at 780)).

> In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence—it can weigh the evidence, disbelieve witnesses, and grant a

new trial even where there is substantial evidence to sustain the verdict.

White, 961 F.2d at 780 (quoting Ryan v. McDonough Power Equipment, 734 F.2d 385, 387 (8th Cir. 1992)).

B. Whether Plaintiff's Liberty Interest Claim was Properly Raised

The City contends that Plaintiff should not have been allowed to present a liberty interest claim to the jury because it was not asserted in the Complaint. It argues that the only claim asserted in the Complaint was a claim of a violation of procedural Due Process.

This issue, however, has been raised and resolved prior to trial when this Court denied the City's Motion in Limine on this issue. The Court found that the Complaint asserted a Due Process claim which encompasses both a property and liberty interest. See Winegar v. Des Moines Independent Community School District, 20 F.3d 895, 899 (8th Cir. 1994). Furthermore, the name-clearing hearing argument was noted in the Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment.

C. Whether the Verdict is Supported by the Evidence

1. Whether Plaintiff Was Entitled to a Name-Clearing Hearing

a. Whether Plaintiff, as an At-Will Employee, Had a Liberty Interest

The City argues that under Eighth Circuit law, a public employee has no property or liberty interest in employment if his employment is at-will. It relies on Brunson v. Morgan, 2 Fed. Appx. 684, 685 (8th Cir. 2001), a one paragraph, unpublished decision which held that "as an at-will employee, plaintiff did not have a liberty or property interest in his employment and thus could not state a section 1983 claim against defendants."

More recent Eighth Circuit opinions, however, make it clear that a public employee's right to a name-clearing hearing is independent from an employee's at-will status. The Eighth Circuit has held that, while an at-will employee generally does not have a protected liberty interest in continued employment which would obligate an employer to provide a hearing in connection with the employee's discharge, "*[a]n exception exists . . . in cases where an employee is terminated in connection with publicized allegations of illegal or improper conduct.*" Hammer v. City of Osage Beach, Missouri, 318 F.3d 832, 839 (8th Cir. 2002) (emphasis added) (citing Speer v. City of Wynne, 276 F.3d 980, 984 (8th Cir. 2002)).

The Supreme Court held that a public employee has a liberty interest in his or her good name and reputation, which is entitled to protection when he is fired based on allegations of dishonesty, immorality, or illegality. Board of Regents v. Roth, 408 U.S. 564, 573 (1972). In order to establish the deprivation of a liberty interest under Eighth Circuit law, a public employee must make a three-part showing:

> (1) the public employer's reasons for the discharge stigmatized the employee by seriously damaging his standing and association in the community or by foreclosing employment opportunities that may otherwise have been available;
>
> (2) the public employer made the reason or reasons for the discharge public; and
>
> (3) the employee denied the charges that led to the employees firing.

Speer, 276 F.3d at 984; Coleman v. Reed, 147 F.3d 751, 754-55 (8th Cir. 1998); Hammer, 318 F.3d at 839-40. Where this showing has been made, the employee must be provided with adequate notice and an opportunity to dispute the charges in a

name-clearing hearing. Hammer, 318 F.3d at 840 (citing Codd v. Velger, 429 U.S. 624, 627-28 (1977)).

In sum, the City's argument that Plaintiff's status as an at-will employee precludes a liberty interest claim is contrary to Eighth Circuit law.

b. Whether the Criticism About Plaintiff's Performance Implicated a Liberty Interest

(1) Whether the Statements Damaged Plaintiff's Reputation in a Manner That Foreclosed Future Job Opportunities

The City contends that the jury's finding of a liberty interest violation was against the weight of the evidence and contrary to law because there was no evidence to establish that the charges made against him at the City Council meeting damaged his reputation in a manner that foreclosed future job opportunities. The City relies on Green v. St. Lois Housing Authority, 911 F.2d 65, 69 (8th Cir. 1990), for the proposition that a public employee is deprived of his liberty interest in connection with a discharge only when it occurs under circumstances which impose upon the employee a stigma or other disability foreclosing his freedom to take advantage of other employment opportunities. Green also states that the charges made must injure the employee's good name, reputation, honor or integrity. Id. (citing Doe v. United States Department of Justice, 753 F.2d 1092, 1105, 1111 (D.C. 1985)).

The City also maintains that merely falsely charging an employee with unsatisfactory job performance when terminating him does not infringe on his liberty interest. Green, 911 F.2d at 69. (citations omitted). It also relies on a dissenting opinion in Melton v. City of Oklahoma City, 928 F.2d 920, 932-933 (10 th Cir. 1991), which stated that:

> Charges are not stigmatizing enough to rise to a constitutionally protected liberty interest unless

> they involve allegations of dishonesty, immorality, or unprofessional or illegal conduct of the type that would be expected to seriously diminish employment opportunities. Charges of poor job performance, negligence, tardiness, or even insubordination, would not rise to the level of a violation of a protected liberty interest.

Id. (citing Roth, 408 U.S. at 573).

The City argues that Plaintiff testified that the stigmatization consisted essentially of criticisms of his performance, primarily his visibility. It states that Plaintiff testified that the most serious accusation was that he was not working all the hours he claimed to be working, suggesting to him that he was "cheating" the City. The City also argues that although City Council members testified that the criticism "stigmatized" the Plaintiff, they did not testify that the charges actually damaged his reputation so as to preclude future employment.

The City claims that in order to establish a liberty interest violation, Plaintiff had to do more than show damage to his reputation. It argues that he was required to prove that the charges against him were so seriously damaging to his reputation so as to impair future employment opportunities. Since the City claims Plaintiff identified no such evidence, and in fact obtained employment within six months of his termination, the jury verdict should not stand.

The Plaintiff, on the other hand, contends that the statements made at the City Council meeting were the types of accusations that give rise to a name-clearing hearing. He claims that the statements went far beyond a fair-minded analysis of job performance and were personal attacks on his integrity. He points to the testimony which referred to the accusations as a "bashing" and the councilors' testimony that the statements were harsh attacks of a personal nature, and that they were the type that would harm one's reputation.

Plaintiff also contends that the City's reliance on the dissenting opinion in Melton, describing the type of assertions that trigger a name-clearing hearing, actually supports his position. He argues that the accusations directed toward Plaintiff constitute dishonesty and implied unprofessional or illegal conduct on his part, by asserting that he took too much vacation and maintained inaccurate time records.

Furthermore, Plaintiff argues that it is not necessary that the stigmatizing statement actually prevent Plaintiff from obtaining future employment. Rather, it is sufficient that the statements were of the type that "would be expected to seriously diminish employment opportunities." Melton, 928 F.2d at 933 (emphasis added). However, even if actual foreclosure of employment was necessary, Plaintiff claims that the implication that he fabricated time records was damaging to his future employment prospects because his career depends on honesty and integrity. Plaintiff further argues that he testified that because of the notoriety thrust upon him, he became depressed, reclusive, and was foreclosed, as a practical matter from seeking law enforcement work in the area.

While Green does suggest that actual foreclosure of future employment is necessary, the three-part test forth by the Eighth Circuit in a number of cased decided after Green does not expressly set forth such a requirement. As previously discussed, the first element necessary to establish a public employee's entitlement to a name-clearing hearing is "[t]he public employer's reasons for the discharge stigmatized the employee by seriously damaging his standing and association in the community *or* by foreclosing employment opportunities that may otherwise have been available." See, e.g., Gibson v. Caruthersville School District, 336 F.3d 768, 773 (8th Cir. 2003) (emphasis added); Speer, 276 F.3d at 984; Hammer, 318 F.3d at 839-40. The language used in these cases suggests that a statement must be sufficiently

stigmatizing as evidenced by *either* seriously damaging the employee's reputation in the community *or* by foreclosing employment.

The Tenth Circuit case relied upon by the City also does not support the proposition that actual foreclosure of job opportunities is required to establish a right to a name-clearing hearing. In Melton, the court held that a jury instruction which allowed the jury to find that plaintiff was entitled to a name-clearing hearing on the grounds that he was foreclosed from future employment opportunities, without also finding that he had been stigmatized, was erroneous. Melton, 928 F.2d at 927. The majority opinion stated that "[t]he employee does not have to prove *actual* denial of a job opportunity. It is sufficient that a plaintiff prove termination based upon a publicized false charge of sufficient opprobrium that would make the plaintiff an unlikely candidate for employment by a future employer." Id. n.11 (citing Green, 911 F.2d at 69).

Furthermore, the dissenting opinion, which the City cites, attempts to clarify the majority opinion:

> [T]he [majority] opinion does not hold that the terminated employee must prove both stigmatization and foreclosure of future employment. . . . "[S]tigmatization" sufficient to warrant recovery occurs when a charge might "seriously" damage the discharged employee's community standing and associations-e.g., dishonesty or immorality. . . . While Roth also mentions charges that put the employee's "good name, reputation, honor, or integrity" at stake, clearly it is speaking in terms of a high level of stigma that might affect future employment opportunities.

Melton, 928 F.2d at 932 (Logan, McKay and Seymour, dissenting) (citations omitted).

In sum, case law decided after Green indicates that it is not necessary that the Plaintiff prove he was actually foreclosed from employment opportunities in order to establish his entitlement to a name-clearing hearing. In this case, the jury's finding of a liberty interest was not against the weight of the evidence or contrary to law. This Court finds that based on the testimony, there was sufficient evidence for the jury to conclude that Plaintiff was seriously stigmatized and that the stigma rose to the level necessary for a liberty interest violation as set forth by the Eighth Circuit.

(2) Whether Plaintiff Was Terminated For Performance Reasons

The City also maintains that Plaintiff's liberty interest was not implicated because he lost his job because the City eliminated the police department and not because of any performance reasons. It argues that only in cases where a person's good name, reputation, honor, or integrity is at stake *because of what the government is doing to him,* are notice and an opportunity to be heard essential. Roth, 408 U.S. at 573.

The City argues that in this case, the stigmatizing statements were not asserted as the reasons for the Plaintiff's termination. It claims the greater weight of the evidence establishes that Plaintiff was terminated because of the City's decision to eliminate the police department, and not because of stigmatizing charges against him.

Conversely, Plaintiff argues that the only reasons given for abolishing the police department and terminating Plaintiff were improper performance, including excessive use of vacation time, excessive days off for holidays, and alleged fabrication of time records to indicate that he was working when he actually was not. He claims that none of the City

Council minutes or documents reflect any discussion of cost considerations as a reason for eliminating the police department, and that the absence of any such discussion was testified to by Winskowski, Winskowski's wife, Trooper Znaida, and most or all of the City Council members.

Furthermore, Plaintiff points to the approval by the City Council of a budget for the police department for the upcoming year, including Plaintiff's salary, less than an hour before it decided to abolish the police department. He contends this is the "ultimate evidence" that the accusations of improprieties were the reason for his termination.

This Court finds that there was sufficient evidence for the Jury to conclude that Plaintiff's termination was tied to the stigmatizing accusations against him such that the City cannot meet the standard for judgment as a matter of law or for a new trial.

(3) Whether Plaintiff Had to Raise a Jury Question as to Whether the Stigmatizing Statements Were False

The City also argues that Plaintiff was not entitled to a name-clearing hearing because he did not demonstrate any facts that raised a jury question as to whether the alleged stigmatizing statements were false. It relies on Seal v. Pryor, 670 F.2d 96, 99 (8th Cir. 1982) for the proposition that a public employee must prove that the stigmatizing information was false.

The Eighth Circuit's statement in Seal, relied upon by the City, cites the United States Supreme Court decision in Codd v. Velger, 429 U.S. 624, 628 (1977). In both Seal and Codd, however, the Plaintiff employee did not contest the truth of the underlying stigmatizing statements. The Supreme Court in Codd stated: "If [plaintiff] does not challenge the substantial truth of the material in question, no hearing would afford a promise of achieving that result for him . . ." Codd, 429 U.S. at 627-28.

This statement is consistent with more recent Eighth Circuit decisions, which clarify that the plaintiff must only deny the substantial truth of such charges. See, e.g., Hogue, 791 F.2d at 1322 n.4; Coleman v. Reed, 147 F.3d 751, 755 (8th Cir. 1998); Speer, 276 F.3d 980, 984 (8th Cir. 2002). Therefore, the City's argument that the jury's verdict was contrary to evidence, on the ground that Plaintiff failed to raise a jury question on whether the stigmatizing statements were false, is inconsistent with the Eighth Circuit's standard for a name-clearing hearing.

(2) Whether Plaintiff Received a Name-Clearing Hearing

The City claims that the evidence did not support the jury's conclusion that Plaintiff was denied a name-clearing hearing. The City's Employee Work Rules provided that an employee "may request a confidential grievance hearing with the City Council to air any grievance." The City claims that after the stigmatizing statements were made, Plaintiff requested a grievance hearing, which was held a week later at the next City Council meeting, at which the City claims Plaintiff addressed the criticisms regarding his performance.

The City acknowledges that a public employee has the right to a name-clearing hearing at a meaningful time if his termination is accompanied by publication of stigmatizing reasons for his termination that might impair future employment opportunities. In Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985), the Supreme Court held that deprivation of liberty must be preceded by notice and an opportunity for a hearing appropriate to the nature of the case.

The City argues that Plaintiff was provided a pre-termination hearing that was sufficient under Loudermill to protect his liberty interest, in that Plaintiff was given notice and an opportunity to be heard in response to the allegedly

stigmatizing reasons for his termination. See Roth, 408 U.S. at 573 (holding that in a case where the University employee's liberty interest was implicated because he was denied re-employment based on the University's publication of serious charges, "due process accords an opportunity to refute the charge before University officials.").

The City claims it was improper for the Plaintiff's counsel to tell the jury that a name-clearing hearing must be held in public. It claims no reasonable jury could have found that Plaintiff did not receive a constitutionally sufficient name-clearing hearing when he met in private with the City Council to address the criticisms of his performance.

Plaintiff claims he was not afforded any "meaningful" pre-termination opportunity to vindicate his name. He notes that stigmatizing statements were made against him in public, at open City Council meetings and circulated throughout the small community. The following week, Plaintiff addressed the Council members in a confidential session. Plaintiff claims that in this confidential session, he described his job duties, but did not respond specifically to the accusations against him, which he claims was not the purpose of the meeting.

The meeting with the City Council members was held in private. Because the purpose of a "name-clearing" hearing is to allow an employee to vindicate his reputation, Plaintiff argues that when the accusations are made in public, an individual can hardly remove that stain by addressing his accusers in private.

There does not appear to be any case law that directly addresses the question of whether or not name-clearing hearings must be held in public. However, a number of cases imply that a public hearing is required.

As the City recognized, the Roth opinion notes that a University employee whose liberty interest was violated should be given an opportunity to refute the charges "before

University officials." Roth, 408 U.S. at 573. While this statement does not clarify whether such a meeting could actually be held in private, a later United States Supreme Court decision interpreting Roth suggests otherwise.

In Owen v. City of Independence, Missouri, 445 U.S. 622, 633 n.13 (1980), the Supreme Court stated,

> In Board of Regents v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707, 33 L.Ed.2d 548 (1972), we explained that the dismissal of a government employee accompanied by a "charge against him that might seriously damage his standing and association in his community" would qualify as something "the government is doing to him," so as to trigger the due process right to a hearing at which the employee could refute the charges and *publicly clear his name.*

Id. (emphasis added); see also Ratliff v. City of Milwaukee, 795 F.2d 612, 625-27 (7th Cir. 1986) ("[I]f such charges were published, Ratliff had a due process right to a hearing at which she could attempt to refute the charges and publicly clear her name."); Whitney v. Board of Regents of University of Wisconsin, 335 F. Supp. 321, 324 (E.D. Wis. 1973) (holding that the "appropriate remedy" for the failure to provide a name-clearing hearing "is not to reinstate plaintiff but merely to provide him with an effective opportunity to refute the charges *publicly* and, if possible, to grant him any damages which he can show arose from the original denial of that opportunity") (emphasis added). These decisions suggest that a name-clearing hearing may be insufficient to meet due process if it were not held in public.

The jury's determination that the City failed to satisfy Plaintiff's right to a name-clearing hearing was supported by the evidence and was not contrary to law. Therefore, neither

judgment as a matter of law nor a new trial is warranted based on this issue.

(3) Whether Plaintiff's Denial of a Name-Clearing Hearing Caused Compensable Damages to the Plaintiff

The City's final argument is that the evidence did not support the jury's determination that the denial of a name-clearing hearing caused compensable harm to the Plaintiff. The City relies on Carey v. Phiphus, 435 U.S. 247, 259-64 (1978).

The City argues that, while Plaintiff testified that he was depressed about being terminated, he did not testify that he suffered any economic loss or emotional distress as a result of being denied a name-clearing hearing. The City contends that even if Plaintiff was entitled to a name-clearing hearing, he was not entitled to damages related to his loss of employment, but only those damages, if any, that were directly caused by the denial of the process itself. Carey, 435 U.S. at 265.

The City further argues that because Plaintiff was found to be an at-will employee with no right to continued employment, the residual right to the retention of one's good name is not enough in itself to trigger more than an award of nominal damages. Skeets v. Johnson, 805 F.2d 767, 774 (8th Cir. 1986). It is the loss to the Plaintiff's reputation that is compensated, not the loss of employment. Id. (citing Hogue, 791 F.2d at 1328).

In response, the Plaintiff argues that he offered substantial evidence of actual economic loss from the termination in employment and the obloquy that accompanied the termination. He argues that he also established that he suffered significant emotional distress as a result of the accusations made against him. Thus, he contends that the

$125,001 in damages awarded by the jury was not implausible or exorbitant.

Plaintiff further argues that the damages in a name-clearing case are necessarily subjective and depend on the circumstances of each case. He notes that the Eighth Circuit, in Hogue, 791 F.2d at 1323, held that in a name-clearing case, "[a]ctual damages such as backpay . . . will be awarded" if the plaintiff "can prove actual injury." Plaintiff also argues that a claimant may be entitled to damages for "mental and emotional distress" for liberty or property interest violations. See, e.g., Bishop v. Tice, 622 F.2d 349, 357 (8th Cir. 1980). Furthermore, it points to Karr v. Townsend, 606 F. Supp. 1121, 1127 (W.D. Ark. 1985), which recognized that even though an employee is at-will, there are situations where a pre-termination "name-clearing" hearing, if given, could result in preventing or reversing a decision to discharge the employee.

The case law makes clear that while the City correctly cites Carey for the proposition that any damages awarded to the Plaintiff must directly flow from the deprivation of due process, the Plaintiff is not limited to nominal damages, as long as he can prove actual injury. See, e.g., Skeets, 805 F.2d at 774 (holding that, under Carey, an employee alleging that a discharge resulted in a deprivation of liberty could only recover nominal damages unless it could be shown that a pretermination hearing would have changed the result or that the plaintiff could demonstrate actual damages such as emotional distress); Brewer v. Chauvin, 938 F.2d 860, 864 (8th Cir. 1991) (recognizing that other damages caused by the denial of procedural due process such as mental or emotional distress may be recovered) (citing Carey, 435 U.S. at 263-64)).

This Court finds that there was sufficient evidence to have led the jury to its conclusion. The jury could have relied on the testimony regarding the harm to Plaintiff's reputation

and his emotional distress and based the entire award of damages on these items or it could have determined that Plaintiff would not have been terminated had he been provided with a name-clearing hearing.

The City also briefly raises the issue that as an alternative to judgment as a matter of law or a new trial, it should be entitled to remittitur. It claims Minnesota case law supports remittitur when "[e]xcessive or insufficient damages [appear] to have been given under the influence of passion or prejudice . . . ." Minn. R. Civ. P. 59.01(e); Jangula v. Klocek, 170 N.W.2d 587, 594 (1969).

Plaintiff argues that the amount awarded is not excessive such that remittitur is warranted on the grounds of "passion or prejudice" of the jury, because substantial damages are allowable when reputation is besmirched. See, e.g., LeDoux v. Northwest Publishing, Inc., 521 N.W.2d 59 (Minn. Ct. App. 1994) (upholding jury award of non-economic damage of $676,000 for harm to reputation in defamation action); Keenan v. Computer Associates International, Inc., 13 F.3d 1266 (Minn. 1994) (affirming jury award of $100,000 in defamation action).

This Court agrees that remittitur is not appropriate in this case, as the damages are not excessive, nor do they appear to have been awarded under the influence of "passion or prejudice."

IT IS HEREBY ORDERED that:

1. Defendant City of Stephen's Motion for Judgment as a Matter of Law, or in the Alternative, For a New Trial [Docket No. 61] is **DENIED.**

Dated: May 10, 2005

s/ Michael J. Davis
Judge Michael J. Davis
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Gregory Winskowski, Plaintiff,

v.

City of Stephen, a municipal corporation, Defendant.

Civ. No. 02-4082 (MJD/RLE)

SPECIAL VERDICT FORM

Answer each of the following questions:

1. Was the plaintiff, Police Chief Gregory Winskowski, an "at-will" employee of the City of Stephen?

   Answer: ___X___ Yes

   _____ No

   If your answer is "Yes", please answer question 5 (skip 2,3, and 4).

   If your answer is "No", please answer questions 2,3,4, and 5.

2. Did the City of Stephen terminate the employment of Plaintiff Winskowski because of reasons related to his job performance?

   Answer: _____ Yes

   _____ No

3. Did the City of Stephen provide Plaintiff Winskowski with a Due Process hearing to challenge the termination of his employment?

   Answer: _____ Yes

   _____ No

4. What amount of money is Plaintiff entitled to for damages suffered because he was not given a hearing to challenge

his termination of his employment for each of the following:

a) loss of income, benefits, and other expenses through the time of trial: $ _____ ;

b) loss of income, benefits and others expenses that may be incurred after the trial: $ _____ ;

c) pain, suffering, and mental distress through the time of trial: $ _____ ;

d) pain, suffering, and mental distress after the time of trial: $ _____ .

LIBERTY INTEREST CLAIM

5. Was Plaintiff Winskowski entitled to a hearing by the City of Stephen to clear his name after charges were made against him?

Answer: ____X____ Yes

_____ No

If you answered "Yes", continue with question 6.

If you answered "No", do not answer any other questions. Sign and date the verdict form.

6. Did the City of Stephen provide Plaintiff Winskowski with a "name clearing" hearing?

Answer: _____ Yes

____X____ No

If you answered "Yes," do not answer any other questions. Sign and date the verdict form.

If you answered "No", answer question 7.

7. Did the failure of the City of Stephen to provide a "name clearing" hearing to Plaintiff Winskowski cause damage to him?

Answer: ____X____ Yes

_____ No

8. What amount of money is Plaintiff entitled to for any damages suffered because he was not given a "name clearing" hearing by the City of Stephen?

a) through the time of trial: $ 125,000.00 ;

b) after the time of trial: $ 1.00 ;

THE JURY

By: s/_____
Foreperson

Dated: February 10, 2005 at 4:35 o'clock p.m.

Mansfield Tanick & Cohen P.A.
Attorneys at Law

November 30, 2001

Bradley Scott
Employment Claims Specialist
League of Minnesota Cities
145 University Avenue West
St. Paul, MN 55103

Re: Gregory Winskowski - City of Stephen

Dear Brad:

Thanks for your call the other day.

Without belaboring this matter, the simple fact of the matter is that Greg Winskowski was police chief for the City of Stephen: He was terminated from his position as part of a purported elimination of the police department on December 14, 1998. A copy of the minutes of the City Council meeting reflecting this action is attached at Tab 1.

The action was occasioned by concerns about his performance. In fact, a grievance hearing on alleged Winskowski performance issues was held just prior to the vote to dismiss Mr. Winskowski. See attached Tab 1. Those concerns have been manifested in a letter submitted to city council members from citizen Pat Znajda who states the meeting "turned out to be more of a Greg Winskowski bashing hour" over concerns of whether Mr. Winskowski could get along with the sheriff. A copy of this letter is attached at Tab 2.

Further evidence the decision was made due to performance issues appears in attorney Arthur A. Drenckhahn's November 18, 1998 letter to Daryl Nelson, the City of Stephen City Clerk attached at Tab 3. The letter

concerned "discharging" Greg Winskowski as the city Police Officer and states, "It would seem to me that the better way to approach this would be that you are going to discontinue the City's police department and are going to contract with the County Sheriff's Office for policing for the City. Therefore in conjunction with the discontinuing f[illegible]e police department in the City, Greg would be discharged." Tab 3. The City's decision ostensibly was made for economic reasons, although there was no basis to conclude that the City made a cost savings from the termination.

Because the decision was based on performance, rather than solely for legitimate business reasons, Winskowski is entitled to a hearing. The failure to accord him a hearing constitutes a violation of his right of Due Process afforded to him under the U.S. Constitution of Article I, Section 7 of the Minnesota State Constitution. Mr. Winskowski has sustained substantial economic losses. His salary and benefits as chief of the police department were approximately $ 36,000. He was unemployed for a period of time and since then he has been employed patrolling parks and most recently as a Beltrami County Deputy Sheriff. His income has been approximately $33,000 since the termination. His economic losses to date are about approximately $60,000 including additional rental living expenses, in addition to the loss of having to commute so far to work on a daily basis.

This case is comparable, although not identical, to the *Tuseth* case in the City of Fertile. I know that you are familiar with that case and, I believe, will be able to identify the similarities and, of course, differences between the two matters.

At any rate, Winskowski believes that he is entitled to a hearing and, the denial of the hearing results in his loss of

employment and significant economic losses. He is prepared to pursue appropriate action with respect to this matter.

I recognize that the League and the City, for that matter, will vigorously contest these assertions. Neither side will presumably convince the other that its position is correct.

Accordingly, I suggest that the parties make some type of pre-litigation Alternatives for Dispute Resolution (ADR) process, perhaps mediation or arbitration, to avoid the time, expense and uncertainties of litigation.

Please get back to me at your earliest opportunity.

Thanks for your consideration.

Very truly yours,

MANSFIELD, TANICK & COHEN

Marshall H. Tanick

MNT: ghc

Mansfield Tanick & Cohen P.A.
Attorneys at Law

January 21, 2002

Bradley Scott
Employment Claims Specialist
League of Minnesota Cities
145 University Avenue West
St. Paul, MN 55103

Re: Gregory Winskowski - City of Stephen

Dear Brad:

I thought it might be useful to make one last effort to try and resolve this matter, especially in light of a new document which came to my attention recently. A copy of the document is attached. It substantiates our view that the decision to eliminate the Police Department in Stephen was done because of concerns about the performance of the Police Chief. As such, the decision was disciplinary in nature and would entitle Mr. Winskowski to a hearing, which he was not granted.

I know that neither you nor I wish to engage in a debate of the merits of the case. I do feel, however, that there is substantial evidence that Mr. Winskowski and his position were terminated because of performance-based reasons. At a minimum, there is a factual dispute regarding that issue. While we certainly will not be able to agree on that fact, I also feel that any such claim would necessitate a resolution by a judge or jury.

Accordingly, I would ask that you please review this matter again, especially in light of the new documentation, and get back to me with your thoughts. As previously indicated, I believe there was a violation of the constitutional

rights of Mr. Winskowski because he was not granted a hearing in light of the fact that the decision was, in reality, disciplinary in nature, even though clothed in supposedly economic terms.

This case is, of course, quite comparable to the Fertile case, and I believe it would yield a similar result if pursued through litigation. I hope we can avert that possibility by trying to resolve this matter out of court.

Very truly yours,

MANSFIELD, TANICK & COHEN

Marshall H. Tanick

MHT:tb
Enclosure
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